IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 25-09-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL ORIGINAL PETITION No.28266 OF 2006

Padmanabhan ... Petitioner

-vs-

1.Nagajothi
2.Arul Selvi ... Respondents

Petition under Section 482 of the Code of Criminal Procedure as stated therein.

For petitioner : Mr.N.Manokaran
For respondents : Mr.R.Marudhachalamurthy

O R D E R

This petition has been filed to call for the records relating to the order, dated 21.09.2006, made in C.R.P.No.76 of 2006, on the file of Additional District Court/Fast Track Court No.I, Erode, confirming the order, dated 19.06.2006, made in C.M.P.No.749 of 2006 in M.C.No.44 of 2005 on the file of Chief Judicial Magistrate, Erode, and set aside the same.

2. Petitioner is respondent in M.C.No.44 of 2005, in which his wife, first respondent, and, daughter, second respondent, are complainants, who claimed maintenance from him under Section 125 Cr.P.C. In the said case, an ex parte order was passed on 28.11.2005, on account of non-appearance of the petitioner. Thereafter, the petitioner preferred C.M.P.No.749 of 2006 on 25.04.2006, to set aside the ex parte order and the said petition suffered dismissal on 19.06.2006. Aggrieved over the said order, the petitioner carried the matter in revision before the Fast Track Court No.I, Erode, in C.R.P.No.76 of 2006, which also met with the same fate i.e., dismissal. Hence, the petitioner is before this Court with this petition.

3. The main contention of the learned counsel for the petitioner is that the petitioner was not at all personally served with any summons or notice by the trial Court, namely, Chief Judicial Magistrate Court,

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Erode, and, only on 22.04.2006, he came to know of the ex parte order and, on 25.04.2006, he filed the petition to set aside the said order, under Section 126 (2) Cr.P.C.

4. Conversely, learned counsel for the respondents would vehemently contend that having exhausted the remedy of revisional proceedings before the Fast Track Court, the petitioner is precluded from coming to this Court in the form of original petition under Section 482 Cr.P.C. and, hence, it amounts to preferring a second revision against the order of the trial Court, which is not at all legally permissible. In support of his contention, the learned counsel garnered support from a decision of the Hon'ble Apex Court in Rajathi v. C.Ganesan, 1999 (II) CTC 646, wherein it was held as under :

> "11.....In the present case, the High Court minutely examined the evidence and came to the conclusion that the wife was living separately without any reasonable cause and that she was able to maintain herself. All this High Court did in exercise of its powers under Section 482 of the Code which powers are not a substitute for a second revision under sub-section (3) of Section 397 of the Code. The very fact that the inherent powers conferred on the High Court are vast and would mean that these are circumscribed and could be invoked only on certain set principles."

5. The Hon'ble Supreme Court was of the opinion that petition under Section 482 Cr.P.C. could not be made a substitute for a second revision, which is prohibited by statute.

6. Section 397 (3) Cr.P.C. reads that if an application under Section 397 has been made by any person either to the High Court or to the Sessions Court, no further application by the same person shall be entertained by the other of them.

7. But, later on, in a subsequent decision in Kailash Verma v. Punjab State Civil Supplies Corporation and another, 2005 (2) Supreme Court Cases 571, the Supreme Court has rendered a finding to the effect that in order to avoid serious miscarriage of justice and abuse of process of the Court, the High Court shall exercise inherent jurisdiction. Learned counsel for the petitioner placed much reliance upon the said decision, in which the following is the operative portion :

> "5. It may also be noticed that this Court in Rajathi v. C.Ganesan, 1999 (6) SCC 326 : 1999 SCC (Cri) 1118, said that the power under Section 482 of the Criminal Procedure Code has to be exercised sparingly and such power shall not be utilised as a

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substitute for second revision. Ordinarily, when a revision has been barred under Section 397 (3) of the Code, the complainant or the accused cannot be allowed to take recourse to revision before the High Court under Section 397 (1) of the Criminal Procedure Code as it is prohibited under Section 397 (3) thereof. However, the High Court can entertain a petition under Section 482 of the Criminal Procedure Code when there is serious miscarriage of justice and abuse of the process of the court or when mandatory provisions of law are not complied with and when the High Court feels that the inherent jurisdiction is to be exercised to correct the mistake committed by the revisional court."

8. In view of the dictum laid down by the Apex Court in the above said decision, preferring of proceedings, invoking inherent jurisdiction of the High Court under Section 482 Cr.P.C. is not at all a bar, after a revision was turned down by a revisional Court. Hence, the present petition is legally maintainable.

9. Next is the outcry of the petitioner that he did not receive any notice.

10. It shall be stated that the particulars pertaining to despatch of process from the Court in the proceedings, further course of communication and address of the petitioner are very much available in the order passed by the Fast Track Court, as per which, on 07.10.2005, the Chief Judicial Magistrate Court sent summons to the petitioner by registered post; the registered postal cover bears an endorsement to the effect that intimation was given to the addressee; it was retained by post office till 19.10.2005, for the purpose of serving upon the addressee, and, since it could not be done, the registered postal cover was returned back to the C.J.M.Court, Erode, on 20.10.2005. The Fast Track Court has observed in its order that even though the registered postal cover was kept by the post office uptil 19.10.2005, the petitioner had not claimed and received the said cover and, hence, with the knowledge of the said post, he wilfully avoided to receive and returned back the same.

11. In this context, it is pertinent to state that the postal cover did not have the endorsement, as "refused". In the view of this Court, the above finding is not appropriate, for the reason that in the absence of any proper endorsement on the postal cover as if it was refused by the addressee, there could be no conclusion by the Court that the addressee had wantonly avoided receipt of the same.

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12. Learned counsel for the petitioner would submit that in criminal cases, service of summons to a party should be effected as per Section 62, as adumbrated in Chapter VI of the Criminal Procedure Code, and, in the absence of due observance of the above said provision, it must be presumed that no personal service was effected on the party concerned.

13. Section 62 Cr.P.C. runs as follows :

> "62.Summons how served.- (1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.
>
> (2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.
>
> (3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate."

The above said provision mandates personal service of summons, if practicable.

14. In this connection, learned counsel for the petitioner would draw attention of this Court to the following decisions, which are on the subject of service of summons :

(i) S.Thulasingam v. Padmavathi Ammal, 1963 (1) Crl.L.J.546 (Vol.66, C.N.170), in which it is observed as below :

> "Service by registered post in case of proceedings under S.488 Criminal P.C.is not a proper service since this mode is not one of the modes mentioned in chapter VI, which relates to service of summons except in the single instance of summons to an incorporated company. Consequently, a person who has been served by registered post cannot be set down ex parte on his failure to appear."

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> "It has been held in several decisions that the service of summons by registered post on the person proceeded against under S.488 Crl.P.C.is not permissible under the Criminal Procedure Code, and that in such a case the person cannot be proceeded against ex parte under the proviso to S.488 (6) of the Criminal Procedure Code."

(ii) Pahilajrai v. Jethi Bai, AIR 1959 PATNA 433 (V 46 C 123), wherein it is held as follows :

> "Service of notice has to be effected as contemplated under S.68 read with Ss.69 and 70 of the Code before making an ex parte order against the husband under S.488. Mere publication of the notice in the Government Gazette cannot serve the purpose of notice as understood under S.68 read with S.69 unless provision to that effect has been made by the State Government. For, under the provisions of the said sections not only the summons must issue but it must be served, in the absence of any express direction by the State Government, by a police-officer or by an officer of the Court issuing it or by any other public servant. In the absence of the service of summons, the ex parte order made under S.488 is liable to be set aside."

15. It is to be observed that when there was no personal summons on the party concerned, the process of service of summons could not be completed and there could be no presumption as to service.

16. Another limb of contention of the learned counsel for the respondents is that the petition filed by the petitioner to set aside the ex parte order under Section 126 (2) Cr.P.C. is not at all entertainable by the Court, since the said petition had been made out of stipulated period, namely, three months from the date of the order and no sufficient cause was shown either to condone the delay or to allow the petition.

17. In this regard, it is the argument of the learned counsel for the petitioner that only on 22.04.2006, he came to know of the ex parte order and immediately on 25.04.2006, he filed the petition for setting aside the ex parte order, which contention receives a scathing attack from the side of the respondents.

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18. It is true that the petition to set aside the ex parte order should have been made within three months from the date of the ex parte order and the proviso does not provide for filing of any such petition after three months from the date of the order. In short, the provisions do not prescribe anything for condoning the delay. In this connection, the question of filing application under Section 5 of the Limitation Act has become academic.

19. Now, it is to be found out, whether the petition could be filed within three months from the date of knowledge of the order. In fact, there was no personal service on the petitioner. Had the petitioner been personally served with the summons, he might be out of Court and he could not agitate before the Court that he filed the petition within three months from the date of knowledge. But, the fact in this case is otherwise. In the absence of personal service of summons on the petitioner, his version that he had knowledge of the order only on 22.04.2006 has to be necessarily relied upon. Hence, he could very well maintain the petition, which was filed beyond the prescribed time limit of three months. An earlier decision of this Court in Sukhirthammal v. Subramanian, 1985 CRI.L.J.1294, supports this finding. The observation in the said decision goes thus :

> "24. This question about the applicability of S.5 of the Limitation Act has become academic in the present case since the dispute in this case is with regard to the time from which the period of limitation is to be reckoned viz., whether it would start from the date of the ex parte order or from the date of knowledge on the part of the respondent about the said order. It is to be pointed out that the learned Magistrate himself has given a finding that there is nothing to show that the respondent was served with summons in the maintenance proceedings, that according to the respondent he came to know about the ex parte order only on 16-9-1978 and that he had taken out the application for setting aside the ex parte order on 28-11-1978 well within the period of three months from the date of such knowledge. In the present revision also, the petitioner has not placed any material to show that the first limb of the proviso to S.126 (2) Cr.P.C. has been satisfied in this case for this Court to hold that the period of limitation would run from the date of the order. On the other hand, it is clear that the respondent had moved the Court below for setting aside the ex parte order within a period of three months from the date of knowledge of the said order."

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20. To sum up, there was no personal service on the petitioner, in the absence of which, the ex parte order passed against his is liable to be set aside. Even though he knocked the door of the Court after three months from the date of ex parte order, he could very well maintain the petition to set aside the ex parte order, as he has initiated proceedings within three months from the date of his knowledge. The present petition also could not be termed to be a substitute for second revision, since this Court has got plenary powers under Section 482 Cr.P.C., to avoid miscarriage of justice and abuse of process of Court.

21. For the foregoing reasons, this petition is allowed. Consequently, the connected Criminal M.P.No.1 of 2007 is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Chief Judicial Magistrate,
Erode.

2. The Additional District Judge,
Fast Track Court No.I, Erode.

1 cc To M/s.N.Manokaran, Advocate, SR.59737.

CRL.O.P.No.28266 of 2006

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